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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 387

GRAFTON MAHONEY,

Appellant,

vs.

THE PAROLE BOARD OF THE STATE OF NEW JERSEY

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States as amended, Petitioner-Appellant submits herewith his statement, particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the Supreme Court of New Jersey entered in this cause.

Opinion Below

The Opinion of the Supreme Court of New Jersey was filed on June 26, 1952 and appears in the advance reports of Atlantic Reporter, Second Series, for August 23, 1952. The decision is cited as 90 A. 2d 8. The majority, six Judges concurring, sustained the constitutionality of the statute in an Opinion by Justice Burling; a dissenting Opinion was

filed by Justice Heher. Copies of said opinions are attached hereto as Appendix A.

Jurisdiction

The judgment of the Supreme Court of New Jersey was entered on June 26, 1952. A Petition for Appeal, Citation, Order allowing Appeal, Assignments of Error and Statement as to Jurisdiction were presented to the Supreme Court of New Jersey prior to August 6, 1952, but Chief Justice Vanderbilt declined to allow the appeal, advising that it be presented to the United States Supreme Court Justice for the Circuit; said letters are appended hereto as Exhibit B.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, U. S. Code, Section 1257, Statute of June 25, 1948, Chapter 646, 62 Stat. 929, and Title 28, U. S. Code, Section 2104, because there is drawn in question the validity of the New Jersey Parole Act of 1948 (Chapter 84, Laws of 1948) which Appellant contended was repugnant to the Fourteenth Amendment to the Constitution of the United States guaranteeing to all persons the equal protection and due process of the laws and the decision of the Court was in favor of its validity.

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

Lanzetta v. *State of New Jersey*, 306 U. S. 451; 59 Sup. Ct. 618;
Zucht v. *King*, 260 U. S. 174; 43 Sup. Ct. 24;
Yick Wo v. *Hopkins*, 118 U. S. 356; 6 Sup. Ct. 1064.

The federal question here presented was raised in the first instance by appeal to the Appellate Division of the Superior

Court of New Jersey to obtain a declaration as to the constitutionality of Paragraph c of Section 12 of the Parole Act whereunder the Parole Board of New Jersey denied Appellant consideration for release on parole. Prior to hearing and decision of the Appellate Division of the Superior Court, the Supreme Court of New Jersey on its own motion certified the cause to it for final determination of the constitutional issues raised by Appellant. The Supreme Court of New Jersey, by a decision of 6 to 1, sustained the constitutionality of the statute. The majority Opinion and dissenting Opinion are set forth as Appendix A.

Throughout the proceedings in the Appellate Courts of New Jersey, Appellant specifically charged that Paragraph c of Section 12 of said statute was repugnant to and violated the Fourteenth Amendment in that it denied the equal protection and due process of the laws guaranteed under said Amendment. These constitutional issues were preserved throughout as the majority and dissenting Opinions disclose.

Questions Presented

Where a statute enacted pursuant to a state constitutional mandate to create a parole system deals with parole rights of recidivists and thereunder confers parole consideration to fourth offenders who serve life sentences and to fourth offenders committed to County penitentiaries but denies such parole consideration to 4th offenders committed to the State prison, is it violative of the Fourteenth Amendment to the Constitution of the United States guaranteeing to all persons the equal protection of the laws?

May a State enact a parole law which is administered with an unequal hand so as to make illegal discriminations between persons in similar circumstances whereby those favored may be released under parole before the expiration of the maximum and those discriminated against denied

such consideration until they have served the maximum sentence?

Statutes Involved

Chapter 84, New Jersey Laws of 1948, known as the Parole Act. The sections of said Statute involved are 11, 12(c) and 35, which are set forth in Appendix C hereto.

Statement

Appellant was duly committed to the New Jersey State Prison on April 21, 1937 to serve 5 consecutive sentences, 4 of which were for a minimum of 3 years and a maximum of 5 years, and a fifth with a minimum of 2 years and a maximum of 3 years, on charges of breaking and entering and the possession of burglar tools. Appellant has served the maximum of the first 4 sentences and is now serving the maximum of the fifth.

The Parole Board of New Jersey in an ex parte proceeding, upon consideration of his prior prison record, adjudged him to be a fourth offender and as such, under Paragraph c of Section 12 of said statute, ineligible to receive parole consideration until he shall have served the maximum of the sentences imposed by the Court. Feeling aggrieved because under Section 11 fourth offenders serving life imprisonment and under Section 35 of said statute fourth offenders committed to the County penitentiaries were entitled to and did receive parole consideration prior to the expiration of their maximum sentences, Appellant, on January 2, 1952, formally requested the Parole Board of New Jersey to consider his case for parole purposes. On January 4, 1952 the Parole Board refused this request, stating that "it is precluded from considering him eligible for release on parole until he has served the maximum of the sentence or sentences imposed". (Appendix 3a, 4a.)

Pursuant to the Rules of the New Jersey Appellate

Courts, an appeal from the decision of this administrative tribunal was prosecuted first to the Appellate Division of the Superior Court and finally to the Supreme Court of New Jersey (the State Court of last resort). On June 26, 1952, the Supreme Court of New Jersey, by majority decision, held that the Parole Act as invoked against Appellant was constitutional and was not repugnant to the Fourteenth Amendment.

The Parole Statute on its face and in operation permits arbitrary and discriminatory parole consideration in relation to fourth offenders and Appellant's appeal from the decision of the Parole Board throughout the Appellate Courts of New Jersey was specifically predicated on the fact that the statute was violative of the Fourteenth Amendment in that it denied to all persons similarly situated the equal protection and the due process of the laws. The final decision of the New Jersey Supreme Court was to sustain the validity of the law holding that it did not contravene the guarantees under the Fourteenth Amendment.

The Questions Are Substantial

1. The issues here raised are of public importance. The rights here involved concern not only personal liberty with respect to parole rights but the welfare of society in general because it is a matter of great concern to society at large that criminal justice be administered with impartiality. The public welfare is vitally concerned in the rehabilitation of prisoners and the parole systems have been adopted to provide incentive to law violators for rehabilitation so that when they have completed their servitude they will be in a position to take their place in society as decent law-abiding citizens.

The State of New Jersey, by constitutional mandate, directed "a system for the granting of parole shall be pro-

vided by law". Under the guarantees of the Fourteenth Amendment as to the equal protection of the laws, it was necessary that such parole system as the Legislature enacted be fair, impartial and evenhanded and that the administration of the law and the exercise of the powers granted thereunder be free from unjust and illegal discriminations.

The statute here under attack is invalid on its face and as applied to Appellant as a fourth offender is arbitrary and discriminatory, thus deserving the condemnation of the Supreme Court of the United States in *McPherson* v. *Blacker* 146, U.S. 1, where the Court stated:

> "The inhibition that no State shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class of persons from being singled out as a special subject for discriminating or hostile legislation."

Paragraph c of Section 12 of the Parole Act, which the Parole Board invoked against Appellant, provides, inter alia:

> "Any person sentenced to any penal institution of this State who has previously served all or part of three terms of imprisonment in any penal institution of the United States or any other State or States . . . shall be deemed to be a fourth offender and upon his incarceration for such fourth or later offense shall be ineligible for parole consideration by the Board until he shall have served the maximum. . . ."

Section 11 of said statute provides:

> "Any prisoner serving a sentence of life shall be eligible for consideration for release on parole after having served twenty-five years of his sentence less commutation time for good behavior and time credits earned. . . ."

Section 35 of said statute provides:

> "Notwithstanding any of the provisions of this Act, any prisoner in a County penitentiary serving a term having a maximum greater than a year and who has served at least one year of such term shall be permitted to make application to the Board for parole. . . ."

Under the foregoing statutory provisions, if Appellant, having already served prison sentences for three prior crimes, had been convicted of murder, for which he would have received a life sentence instead of the sentences he did receive for breaking and entering and possession of burglar tools, he would have received under Section 11 parole consideration upon the expiration of 25 years, less commutation and work credits which, as pointed out in the dissenting Opinion of Justice Heher, would have reduced his sentence to 14 years 7 months and 23 days.

This statute on its face and by operation did and does preclude fourth offenders in prison for crimes of less than murder but for terms which would exceed the normal span of life from receiving parole consideration, while a fourth offender who commits murder and receives the most severe punishment of life imprisonment would be entitled to receive parole consideration in less than 15 years.

Under the Habitual Criminal Law of New Jersey, a fourth offender, upon his conviction of the fourth or subsequent offense, shall be sentenced to life. (N.J. Revised Statutes 2:103-10 as amended) Thus, if Appellant, for the commission of the identical crimes for which he is now undergoing servitude, had been indicted, convicted and sentenced under the Habitual Criminal Law to life imprisonment, he would have been eligible for parole consideration. No reasonable and valid explanation can be offered to sustain such a law which, dealing with the same

class, to wit, fourth offenders, grants the more culpable offender parole rights but deprives others, less culpable in the eyes of the law, of parole rights.

Under Section 35, had Appellant for his fourth or subsequent offense been sentenced to a County penitentiary for a term of not less than a year nor more than eighteen months, he would have received parole consideration after serviture of one year. The State, to justify the grant of parole consideration under Section 35, argues that the County penitentiaries receive offenders who have committed the less serious crimes. Such is not the case. Chapter 153, Laws of 1945, N.J. Stat. Ann., Title 2:192-3, provides for the places of incarceration *and the type of crime is not a relevant factor.* The statute provides, *inter alia*:—

> "Every person sentenced to hard labor or imprisonment . . . for any term of one year or longer shall be imprisoned in the State prison; except that in any County in which a penitentiary is located a person sentenced to hard labor and imprisonment for a term of not less than one year and not exceeding 18 months shall be imprisoned in a penitentiary of such County instead of the State Prison. . . . In any County in which a work house is located any person sentenced to hard labor and imprisonment for a term of not less than one year and not exceeding 18 months may, in the discretion of the Court so sentencing, be imprisoned in such County work house instead of the State Prison or County penitentiary."

It is self-evident that under the New Jersey law it is the term of imprisonment *and not the type of crime* which determines the place of confinement. Had Appellant herein, for the identical offense, received a term of not less than a year nor more than 18 months, he could have been committed under this statute to a County penitentiary, in which case

he would have received parole consideration despite his status as a fourth offender. Surely the geographical circumstance of the location of a County penitentiary cannot afford a basis for classification in legislating as to the parole rights of recidivists.

Paragraph c of Section 12 which was invoked against Appellant makes no attempt to grade the crimes so as to ascertain whether they were felonies or misdemeanors or whether they involved *crimens falsi* or moral turpitude. The statutory requirement is met if a person served prison sentences, whole or in part, in a prison of the United States or a State Prison of the State of New Jersey or of any other State. Indeed, there is not even a statutory requirement that the prior crime or crimes against the United States or the other States for which prison terms were served are crimes under the law of New Jersey.

No reasonable or legal basis for classification exists whereunder fourth offenders serving life or serving sentences in County penitentiaries are favored by parole consideration and fourth offenders committed to State Prisons are denied such rights. It is axiomatic under settled constitutional law that classification must be reasonable and bear a relationship to the policy of the law. Here the Legislature of New Jersey adopted a system of parole supervision to promote rehabilitation incentive for recidivists. Under Section 12 a second offender is eligible after servitude of one-half of the maximum; a third offender at the expiration of three-fourths of the maximum, and under Paragraph c, a fourth offender is ineligible for parole until he serves the maximum. Here the Legislature was dealing with second, third and fourth offenders.

Under these circumstances, no valid or legal explanation can be offered to justify Section 11 which permits a fourth

offender serving a life sentence to receive parole consideration in a far shorter period of time which conceivably could be had by a fourth offender under Paragraph c of Section 12 who committed less heinous crimes. To the same extent, Paragraph c of Section 12, in comparison with Section 35, is unconstitutional under the Fourteenth Amendment. A fourth offender who was committed to a County penitentiary is no different than a fourth offender who is committed to a State Prison, yet by the express terms of the statute and under the enforcement of the Act by the Parole Board, the fourth offender committed to the County penitentiary is favored with parole rights and the fourth offender in the State Prison is discriminated against.

Concluding discussion of the facts, the attention of this Court is respectfully directed to the widespread prison disorders in the State of New Jersey, as well as other States in the Union. These disorders were given widespread publicity and investigations are presently being conducted and remedial measures considered, and one of the prime causes attributed to these disorders was inadequate or discriminatory parole systems.

It is, therefore, in the public interest that this Court take jurisdiction of this case and determine these questions on the merits as to whether administrative tribunals such as the Parole Board of New Jersey can arbitrarily and without legal and constitutional restraint confer to persons similarly situated rights and benefits and deny such rights and benefits to those it wishes to exclude.

2. The opinion of Justice Burling, speaking for the majority, failed to recognize and apply the settled constitutional legal principles established by the many decisions of the Supreme Court of the United States.

In determining constitutional issues, the decisive test as to whether a statute is constitutionally valid *is determined*

not by what is done but what may reasonably be done under the statute.

Lindsley v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 31 S. Ct. 337, 55 L. Ed. 369;

McLean v. *Arkansas*, 211 U.S. 539, 29 S. Ct. 206.

Justice Burling, in discussing and disposing of the inequality as to the rights of fourth offenders under Sections 11 and 35 as compared to Section 12, stated (Appendix A):

> "With these observations in mind we came to consideration of Mahoney's contention that section 12 of L. 1948 is not applicable to recidivists serving a life sentence, who, he contends, are eligible for parole consideration under section 11. . . . However, since the specific conflict between Section 11 and section 12 is not involved in this appeal (Mahoney's last sentence was not one of life imprisonment) it is deemed unnecessary to resolve the same at this time."

In dealing with the conflict between Section 35 and Section 12, the Court stated:

> "With respect to section 35, supra, there is no merit in Mahoney's assertion of discrimination. Section 35 limits the grant of paroles to applications where 'the circumstances of the case warrant' and 'in the manner provided for herein.' These provisions invoke section 12 and preclude parole under section 35 except as limited in section 12. Further, the obvious purpose of section 35 is solely to permit prisoners in a county penitentiary to *apply* for parole, a privilege denied to prisoners in the State Prison and other correctional institutions by section 17 of the same act."

To the contrary, Section 35 expressly and unequivocally is free and independent of Section 12 insofar as if parole rights are concerned because the very first sentence of the section states, "*Notwithstanding any of the provisions of*

this act, any prisoner in a county penitentiary . . . shall be permitted to make application to the Board for parole." (Italics supplied.)

It was an imperative duty of the majority Court to decide the issues raised under Section 11 squarely and not to bypass it by the mere observation that since Appellant was not serving a life sentence, "it is deemed unnecessary to resolve the same at this time." Under the decisions hereinabove cited, the Court was bound to apply the constitutional test as to what reasonably could be done under the statute.

The reasoning and decision of the majority is otherwise erroneous because the majority Opinion recognized a discriminatory effect upon fourth offenders under Section 12 and fourth offenders under Section 35 when it stated, "Further, the obvious purpose of section 35 is solely to permit prisoners in a county penitentiary to *apply* for parole, *a privilege denied to prisoners in the State Prison and other correctional institutions. . . .*" (p. 8). (Italics supplied.)

Thus, the majority decision recognizes a discrimination between fourth offenders under Sections 12 and 35 with respect to the right to "apply" for parole. This was the contention we sought to establish. Under the settled and fundamental law—established by innumerable decisions of this Court—it was the duty of the New Jersey Supreme Court to have upheld Appellant on his constitutional challenge.

In *Louisville and Nashville R. R.* v. *Stock Yards Co.*, 212 U. S. 133, 144, 29 S. Ct. R. 246, the Court said:

> "The law itself must save the parties' rights and not leave them to the discretion of the Courts as such."

The personal guarantees as to the equal protection of the laws under the Fourteenth Amendment are inalienable and under the Amendment Appellant as a fourth offender, whether he were undergoing a life sentence or was com-

mitted to a County penitentiary, was entitled to the equality of treatment of other fourth offenders, especially those favored by Sections 11 and 35.

The dissenting Opinion of Justice Heher, on the other hand, squarely meets and answers the constitutional questions here presented. Having found that a discrimination exists and that the Legislative distinction and artificial classifications were illusory, he rightly ruled, following the many decisions of this Court, that such arbitrary action was repugnant to the basic constitutional safeguards embodied in the Fourteenth Amendment.

He stated:

> "The Constitution contemplates a fair and reasonable exercise of the power in the service of the general parole policy. The Legislature necessarily has a great latitude of discretion in classifying prisoners for parole consideration. But the power is not absolute; its exercise is contained by the dictates of fairness and reasonableness and the equality of right and privilege—the antithesis of arbitrary action—that is basic in our constitutional system." Compare *Finley* v. *California*, 222 U. S. 28, 32 S. Ct. 13, 56 L. Ed. 75 (1911); *Carlesi* v. *New York*, 223 U. S. 51, 34 S. Ct. 576, 58 L. Ed. 843 (1914).

The judgment of the Supreme Court of New Jersey is in opposition to the decisions of this Court bearing on the guarantee of the equal protection of the laws under the Fourteenth Amendment and in view of the conflict of decision as reflected in the majority and minority Opinions, especially since the questions presented by this appeal are substantial and of public importance, this Court should review the cause and decide the issues on the merits.

Respectfully submitted,

SAMUEL KAGLE,
IVAN C. BASH,
Counsel for Petitioner-Appellant.

APPENDIX "A"

SUPREME COURT OF NEW JERSEY, SEPTEMBER TERM, 1951

No. A110

GRAFTON MAHONEY, *Appellant*,

vs.

THE PAROLE BOARD OF THE STATE OF NEW JERSEY, *Respondent*

MAJORITY OPINION OF JUSTICE BURLING

Argued March 24, 1952. Decided June 26, 1952.

On appeal from the Parole Board of the State of New Jersey.

Mr. Samuel Kagle, of the Pennsylvania Bar, argued the cause for the appellant (Mr. Ivan C. Bash, attorney).

Mr. Eugene T. Urbaniak, Deputy Attorney General, argued the cause for the respondent. (Mr. Theodore D. Parsons, Attorney General of New Jersey, Attorney).

The opinion of the court was delivered by

BURLING, *J.*:

This is an appeal to the Superior Court, Appellate Division, under *Rule* 3:81-8 (in lieu of the prerogative of writ of *certiorari*) from an order of the Parole Board of the State of New Jersey. The proceeding was brought to obtain a declaration of the constitutionality and effect of paragraph c of section 12 of L. 1948, c. 84 (the Parole Act; N. J. S. A. 30:4-123.1 *et seq.*) and the validity of a ruling of the Parole Board of the State of New Jersey (hereinafter called the Parole Board) contained in a letter from the Chairman of the Parole Board dated January 4, 1952, denying the appellant, Grafton Mahoney (hereinafter called Mahoney) consideration for release on parole. Although this proceeding was described in the pleadings and briefs as a petition for declaratory judgment under Rule 3:31-10, adjectively

speaking this appears improper inasmuch as no review is sought of an administrative rule promulgated by a state administrative agency. Prior to hearing before the Appellate Division this action was brought to this court pursuant to certification allowed on our own motion.

In the study of this case we must first notice that the Constitution of 1844 contained the following provisions:

> "The governor, or person administering the government, the chancellor, and the six judges of the court of errors and appeals, or a major part of them, of whom the governor, or person administering the government, shall be one, may remit fines and forfeitures, and grant pardons, after conviction, in all cases except impeachment. N. J. Const. 1844, Art. 5, par. 10.

Whereas under the Constitution of 1947, the general subject is dealt with as follows:

> "1. The Governor may grant pardons and reprieves in all cases other than impeachment and treason, and may suspend and remit fines and forfeitures. A commission or other body may be established by law to aid and advise the Governor in the exercise of executive clemency.
>
> 2. A system for the granting of parole shall be provided by law." N. J. Const. 1947, Art. 5, sec. 2, pars. 1 and 2."

Pursuant to that authority the legislature enacted an act in 1948 which took effect May 28, 1948. This established a parole system as distinct from the pardoning power.

It must be observed that the parole act gives the power to and imposes the duty upon the Parole Board to classify the offenders upon entry into confinement so as to formulate a time table for consideration for parole of each inmate. No provision is made for hearing upon the classification in fact it is expressly provided to the contrary. L. 1948, c. 84, sec. 17; N. J. S. A. 30:4-123.17. The wisdom of such a policy is for the legislature and is not a constitutional requirement.

The agreed statement of facts, filed pursuant to Rules 1:2-22 (applicable to the Appellate Division under *Rule*

4:2-6) and 3:81-10 shows: that Mahoney was committed to the New Jersey State Prison at Trenton on April 21, 1937 from the appropriate criminal court in Essex County; that on that same date he was given 5 consecutive sentences, 4 of which had a minimum of 3 years and a maximum of 5 years on conviction of charges of breaking and entering, and the 5th having a minimum of 2 years and a maximum of 3 years on conviction of the charge of possession of burglar tools; that interrogation of Mahoney by prison authorities, and examination of his fingerprint record submitted to them by the Federal Bureau of Investigation of the United States Department of Justice in Washington, D. C., disclosed that he had the following previous criminal record of convictions and sentences:

> As Grafton Mahoney No. A-11391, appellant was convicted of the crime of escape and sentenced to the State Prison in Pittsburgh, Pennsylvania, on May 11, 1921, for a term of 10 years.
>
> As Earl Comer No. 11050, appellant was convicted of the crime of breaking and entering and sentenced on November 4, 1927 for a term of 4 years to the New Jersey Prison at Trenton.
>
> As Grafton Mahoney No. 62797 appellant was convicted of the crime of burglary in a dwelling by night on November 6, 1930 and given a sentence of from 5 to 30 years in the State Prison at Columbus, Ohio.

Mahoney admits that he is the individual so convicted on the dates above specified and was sentenced to and confined in the respective State Prisons at Pittsburgh, Pennsylvania; Trenton, New Jersey; and Columbus, Ohio, all being prior to the sentences now being served by him at State Prison in Trenton. The statement of facts also shows that he was not indicted, tried, convicted or sentenced as an habitual offender at the time of his sentencing in Essex County on April 21, 1937. See *State* v. *Burns*, 136 N.J.L. 601, 603 (E & A 1948).

The Parole Board, upon a consideration of the foregoing prior convictions of the appellant and the fact of his confinement in the aforementioned State Prisons of

Pennsylvania, New Jersey and Ohio, admitted by appellant but not formally proved at a hearing before respondent, determined that he was a fourth offender within contemplation of section 12, Chapter 84, L. 1948 (N.J.S.A. 30:4-123.12) and further determined that respondent was precluded from considering appellant eligible for release on parole prior to the expiration of the maximum of the sentence imposed upon him.

On January 2, 1952, Mahoney addressed a letter to the Parole Board requesting consideration of his case. The Parole Board, by letter of January 4, 1952, addressed to the Principal Keeper of the State Prison, replied as follows:

> "The information in the possession of the State Parole Board indicates that Grafton Mahoney is a fourth offender in contemplation of said Section 12, Chapter 84, P.L. 1948, and it is the judgment of this board that it is precluded from considering him as eligible for release on parole until he has served the maximum of the sentence or sentences imposed upon him less credits for work performed.
>
> "It is further our understanding that Grafton Mahoney does not deny that he was the individual convicted on the prior occasions but rather takes the position that his admission thereof is insufficient to permit this board to classify him as such fourth offender under Section 12 aforesaid.
>
> "Please inform Grafton Mahoney of this decision of the Parole Board."

Shortly thereafter, Mahoney instituted the present proceeding in the Superior Court, Appellate Division. Prior to hearing there, certification was allowed on this court's own motion, as hereinbefore stated.

The questions involved, asserted by Mahoney, are whether he has been denied equal protection of the laws and due process of the law, under the 14th amendment to the United States Constitution, by L. 1949, c. 84 (N.J.S.A. 30:4-123.1 *et seq.*). These necessarily involve construction of various portions of that enactment including para-

graph c of section 12, under which the action of the Parole Board was effectuated.

Mahoney's first objection is that he is, by the terms of the statute, deprived of equal protection of the laws under the 14th amendment to the Constitution of the United States. The gist of Mahoney's contention in this respect is that sec. 12, par. c, of L. 1948, c. 84 (N.J.S.A. 30:4-123.12, c) is not uniformly applicable to 4th offenders, in that some 4th offenders are eligible for parole at an earlier period during their confinement than is Mahoney. To support his contentions he argues that 4th offenders sentenced to life imprisonment under the habitual criminals act (R.S. 2:103-10 as amended by L. 1940, c. 219, sec. 3; see also N.J.S. 2A:85-12) are eligible for parole under section 11 of the parole act (N.J.S.A. 30:4-123.11) after serving 25 years (less good conduct and work credits), and those confined in county penitentiaries serving terms greater than 1 year are eligible for parole after serving at least 1 year of such term. The State agrees with Mahoney that the limitations contained in section 12 have no reference to section 11, and argues that those serving life sentences are in a different class because they have no determinable maximum sentence and if released remain in parole for life whereas those released under section 12 are freed of parole at the expiration of the time of their maximum sentences. As for section 35 of the same statute (N.J.S.A. 30:4-123.35) the State contends that prisoners in a county penitentiary constitute a different class from those confined in a state prison for the reason that their crimes are less serious, and that in any event there is no provision in section 35 releasing county prisoners from the restrictions of section 12. In resolving these conflicting arguments and reaching the construction of the enactment the court is required to read the terms used by the legislature, so as to reach an understanding of the legislative intent and define the same in such a way as to give effect to every word and phrase of the statute. *Hoffman* v. *Hock*, 8 N.J. 397, 406, 409 (1952); *Lynch* v. *Borough of Edgewater*, 8 N.J. 279, 286 (1951). To do this, it seems necessary to set forth in full the language of the pertinent

portions of L. 1948, c. 84 (N.J.S.A. 30:4-123.1 *et seq.*) to which our attention has been drawn. They are as follows:

Sec. 11 (N.J.S.A. 30:4-123.11):

"Any prisoner serving a sentence of life shall be eligible for consideration for release on parole after having served twenty-five years of his sentence, less commutation time for good behavior and time credits earned and allowed by reason of diligent application to work assignments."

Sec. 12 (Par. c.) (N.J.S.A. 30:4-123.12, par. (c)):

"The granting of parole, as provided for herein, shall be limited as follows:

* * * * * * *

(c) Any person sentenced to any penal institution of this State who has previously served all or part of three terms of imprisonment in any penal institution

(1) of this State, of the United States, or of any State other than this State, or

(2) Of this State and the United States, or of this State, the United States and any other State or States, or

(3) Of the United States and any other State or States, or of more than one State other than this State,

"Shall be deemed to be a fourth offender and upon his incarceration for such fourth or later offense shall be ineligible for parole consideration by the board until he shall have served the maximum sentence imposed upon him for such fourth or later offense less any time earned for diligent performance of work assignments; subject, however, to the provisions of section 13 of this act. (Note—Section 13 was repealed by L. 1950, c. 315, sec. 3).

"As used in this section 'penal institution' means and includes the New Jersey State Prison and any

other State penal or correction institution in this State to which offenders are sentenced for fixed terms or fixed minimum and maximum terms and other institutions of like character under the jurisdiction of the United States or a State or States other than this state."

Section 35 (N.J.S.A. 30:4-123.35):

"Notwithstanding any of the provisions of this act, any prisoner in a county penitentiary serving a term having a maximum greater than a year and who has served at least one year of such term shall be permitted to make application to the board for parole. The application shall be on forms to be prescribed and furnished by the board through the warden or chief executive officer of such county penitentiary upon certification that the prisoner desiring to make application is eligible therefor. The board upon receipt of such application may, if the circumstances of the case warrant, grant a parole to any such prisoner in the manner provided for herein, subject to such terms, conditions and limitations as this board may prescribe, and such prisoner while on parole shall be under the supervision of the probation officer of the county from which committed until the maximum term of his sentence has expired."

It is also important to note the following portion of section 17 (N.J.S.A. 30:4-123.17):

"*The release of a prisoner on parole shall be solely upon the initiative of the board and no application for parole made by a prisoner, or on his behalf, shall be considered by the board.* The warden, keeper or chief executive officer of any penal or correctional institution referred to in this act shall permit all prisoners to forward uncensored mail to the board. It shall be the duty of the board to maintain a record of the dates upon which each prisoner shall first be eligible for parole consideration as provided in section nine hereof. On or before such date, in the case of each prisoner, it shall further be the duty of the board to consider the case of each such prisoner for parole and to cause to be brought

before it all information regarding the prisoners referred to herein . . ." (emphasis supplied).

Recidivists are treated differently in various jurisdictions in this country and abroad. Three theories have been suggested by text writers and authorities elsewhere as the foundation concepts for these variant practices, namely (a) punishment imposed for a subsequent offense on the consideration of the persistence of the defendant in his criminal course, (b) warning and deterrent to first offenders and (c) preventive detention or security for the public against the propensities of criminals with repetitive tendencies. See 25 Am. Jur., Habitual Criminals, sec. 1, p. 260 and sec. 3, p. 261; "The Habitual Criminal", Norval Morris (1951). Punishment and deterrents, whether imposed as civil penalties or as sentences following criminal convictions, are designed to the end that offenders will learn that it does not pay to invade the rights of others. With the habitual criminal the police power is exerted primarily to protect the persons and property of citizens of the state because the prisoner's conduct has already demonstrated his inability to learn to accept social and civil responsibility. It is within the power of the state to deprive him of parole. *Ughbanks* v. *Armstrong*, 208 U.S. 481, 52 L. Ed. 582 (1908). Followed in *Connors* v. *Illinois*, 260 U.S. 695, 67 L. Ed. 468 (1922); *Redwine* v. *Texas*, 261 U.S. 608, 67 L. Ed. 825 (1923). Compare *White* v. *Parole Board of State of N. J.*, 17 N.J. Super. 580, 586 (App. Div. 1952).

With these observations in mind we come to consideration of Mahoney's contention that section 12 of L. 1948, c. 84 (N.J.S.A. 30:4-123.12) *supra*, is not applicable to recidivists serving a life sentence, who, he contends, are eligible for parole consideration under section 11 of L. 1948, c. 84 (N.J.S.A. 30:4-123.11) *supra*. However, since the specific conflict between section 11 and section 12 is not involved in this appeal (Mahoney's last sentence was not one of life imprisonment) it is deemed unnecessary to resolve the same at this time.

The real issue on this phase of the case is, as raised by Mahoney, whether (on the assumption that section 12

is inapplicable to one serving a life sentence and therefore eligible for parole under section 11) he, as a fourth offender *not* sentenced to life imprisonment, is unreasonably discriminated against by the terms of Section 12 of the parole act. Mahoney's theory is that under section 11 any life prisoner (including a 4th offender serving a life sentence) is eligible for parole after serving 15 years of his life sentence (the net period of confinement if all legal commutation credits were earned and section 11 applies), whereas, he, Mahoney, must serve a minimum of 23 years (his total maximum time, 31 years, less commutation credits earned) before becoming eligible for consideration for parole. The state argues that the difference in classification is reasonable because a person sentenced to life imprisonment remains subject to parole conditions after his release for the remainder of his life, and at any time may be incarcerated for violation of parole, whereas one not sentenced to life imprisonment will remain subject to parole conditions (and the risk of reincarceration for violation of parole) after his release only for that period of time which constitutes the balance of the maximum of the sentence or sentences imposed upon him. This is a reasonable basis for the difference of classification asserted as presented on this appeal, and it is unnecessary for us to decide whether section 12 applies to a recidivist whose last sentence was to confinement for life.

With respect to section 35, *supra*, there is no merit in Mahoney's assertion of discrimination. The entire statute must be read to reach a proper construction of this section. Section 35 limits the grant of paroles to applications where "the circumstances of the case warrant" and "in the manner provided for herein." These provisions invoke section 12 and preclude parole under section 35 except as limited in section 12. Further, the obvious purpose of section 35 is solely to permit prisoners in a county penitentiary to *apply* for parole, a privilege denied to prisoners in the State Prison and other correctional institutions by section 17 of the same act (quote *ante*).

Mahoney's second question involved is that he was denied

due process of the law by reason of the Parole Board's refusal to accord him a hearing upon the question of his prior convictions. The Parole Board's refusal to accord him such a hearing was effected pursuant to the statutory direction contained in section 17 of c. 84 L. 1948 (N. J. S. A. 30:4-123.17) *supra*, namely that release on parole shall be solely on the initiative of the Parole Board and "no application . . . by a prisoner . . . shall be considered" (except under section 35 of the same act, *supra*). Paroles are favors granted by the State to convict criminals and it may attach such conditions to the application for or the granting of the favor as it may deem proper, or may deny the favor completely. The procedure to ascertain the fact as well as the kind of evidence upon which to base its determination on advisability of parole is a matter of state policy exclusively for the State to decide. "It is not bound to give the convict a hearing upon the question of prior conviction, and a failure to give it violates no provision of the Federal Constitution." *Ughbanks* v. *Armstrong, supra; White* v. *Parole Board of State of New Jersey, supra.*

For the reasons stated, we do find and declare that L. 1948, c. 84, sec. 12, par. (c) (N. J. S. A. 30:123.12(c)), does not violate the 14th amendment to the Federal Constitution and that the action of the Parole Board of the State of New Jersey in classifying Grafton Mahoney as a 4th offender and ineligible for parole at the time of his application therefor was proper and should be and is hereby affirmed. Mahoney's prayer for relief in the nature of a direction to the Parole Board of the State of New Jersey to require the latter to give him a hearing on parole eligibility is denied. Costs shall not be taxed against the appellant.

SUPREME COURT OF NEW JERSEY, No. A-110, September Term, 1951.

GRAFTON MAHONEY, *Appellant*,

v.

THE PAROLE BOARD OF THE STATE OF NEW JERSEY, *Respondent.*

DISSENTING OPINION OF JUSTICE HEHER

HEHER, *J.*, Dissenting:

The State Constitution of 1947 empowers the Governors to grant pardons and reprieves in all cases other than impeachment and treason, and to suspend and remit fines and forfeitures, and to establish a commission or other body to aid and advise the Governor in the exercise of executive clemency, and directs that "A system for the granting of parole shall be provided by law," *Article* V, *Section* II, *paragraphs* 1 and 2.

It is of the essence of this constitutional direction for the establishment of a parole system that the exercise of the power be free from unjust and invidious discriminations. The principle of the equal protection of the laws is implicit in the provision. There can be no arbitrary classification of prisoners for parole eligibility. The Constitution contemplates a fair and reasonable exercise of the power in the service of the general parole policy. The Legislature necessarily has a great latitude of discretion in classifying prisoners for parole consideration. But the power is not absolute; its exercise is contained by the dictates of fairness and reasonableness and the equality of right and privilege —the antithesis of arbitrary action—that is basic in our constitutional system. Compare *Finley* v. *California*, 222 *U.S.* 28, 32 *S. Ct.* 13, 56 *L. Ed.* 75 (1911); *Carlesi v. New York*, 223 *U.S.* 51, 34 *S. Ct.* 576, 58 *L. Ed.* 843 (1914).

Here, the statute makes an arbitrary distinction between fourth offenders who are life prisoners and those who are not that bears no reasonable relation to the policy of the law. The fourth offender undergoing a sentence of life

imprisonment, whether for murder in the first degree or as an habitual criminal under R.S. 2:103-10, as amended (see, also, *N.J.S.* 2A:85-12) becomes eligible for parole consideration when he has served 25 years of his sentence less commutation time for good behavor and work credits making possible a reduction of the minimum period to 14 years, 7 months and 23 days, while a fourth offender not under a life sentence is obliged to serve his full maximum sentence, even although it far exceeds the minimum period which qualifies the fourth offender under a life sentence for parole consideration. In the case now before us the maximum sentence less earned commutation time is 23 years; in some cases the fourth offender's maximum sentence goes beyond the normal life span.

It has been said that release on parole is a matter of grace. It is rather a discretionary function controlled by well-defined considerations concerned with the welfare of society and the interest of the prisoner which need not be elaborated here. Certainly, eligibility for parole consideration is not to be arbitrarily granted in one case and refused in another in like circumstances. Unequal operation of the law would run counter to the genius and spirit of the Constitution. The Constitution is not to be read as conferring absolute power—a wholly unregulated discretion that would admit of partiality and inequality in the extension of paroles. The statement of the affirmative of this proposition carries its own refutation. The use of the term "system" in the grant of power bespeaks its essential quality and limitations. The principle finds expression in the *Fourteenth Amendment* to the *Federal Constitution.* It is expounded in *Smith v. Board of Examiners,* 85 *N.J.L.* 46.

It is not an answer to say that the released life prisoner is subject to parole supervision so long as life lasts, unless clemency be extended, while a fourth offender discharged from imprisonment upon completion of his maximum sentence is not. This I consider an artificial and illusory distinction that does not take into account the policy and purpose of the parole law, *i.e.* release from imprisonment before the maximum sentence is served. Parole is in mitigation

of the punishment, so much so that retroactive laws granting more favorable parole terms to the prisoner are not *ex post facto*. *Lindsy v. Washington*, 301 *U.S.* 397, 57 *S. Ct.* 797, 81 *L. Ed.* 1182 (1937); *People v. Adams*, 274 *N.Y.* 447, 9 *N.E.* (2*d.*) 46 (*Ct. of App. N.Y.* 1937); *Andrus v. McCauley*, 21 *Fed. Supp.* 70 (*D.C. Wash.* 1926).

I would reverse the judgment.

APPENDIX "B"

SUPREME COURT OF NEW JERSEY

Arthur T. Vanderbilt, Chief Justice

August 5, 1952.

Mahoney v. The Parole Board

DEAR MR. KAGLE:

Your letter of July 30th has been received in the absence of Chief Justice Vanderbilt who is in Maine on vacation. He will not return until early in September.

The practice in New Jersey has been for the Chief Justice to decline to allow an appeal, thus making it possible for the applicant to go directly to the Circuit Justice of the United States Supreme Court.

Very truly yours,

(S.) AGNES WAHLGREN,
Secretary to Chief Justice Vanderbilt.

Samuel Kagle, Esquire, 1700 Bankers Securities Building, Philadelphia 7, Pa.

SUPREME COURT OF NEW JERSEY

STATE HOUSE ANNEX

TRENTON, N. J.

August 20, 1952.

Ivan C. Bash, Esq.,
Broad Street Bank Bldg.,
Trenton, N. J.

Re: Grafton Mahoney vs. Parole Board of New Jersey

DEAR SIR:

I am directed by the Chief Justice to advise you that it is not the practice to allow appeals to the United States Supreme Court but to permit counsel rather to apply to the United States Supreme Court Justice for the Circuit.

Very truly yours,

L. E. WARWICK, *for*
John H. Gildea, Deputy Clerk.

APPENDIX "C"

Sections 11, 12 and 35 of the Parole Act of 1948

Sec. 11 (N.J.S.A. 30:4-123.11):

"Any prisoner serving a sentence of life shall be eligible for consideration for release on parole after having served twenty-five years of his sentence, less commutation time for good behavior and time credits earned and allowed by reason of diligent application to work assignments."

Sec. 12 (par. c) (N.J.S.A. 30:4-123.12, par. (c)):

"The granting of parole, as provided for herein, shall be limited as follows:

* * *

(c) Any person sentenced to any penal institution of this State who has previously served all or part of three terms of imprisonment in any penal institution

(1) of this State, of the United States, or of any State other than this State, or

(2) of this State and the United States, or of this State, the United States and any other State or States, or

(3) of the United States and any other State or States, or of more than one State other than this State,

"Shall be deemed to be a fourth offender and upon his incarceration for such fourth or later offense shall be ineligible for parole consideration by the board until he shall have served the maximum sentence imposed upon him for such fourth or later offense less any time earned for diligent performance of work assignments; subject, however, to the provisions of section thirteen of this act. (Note—Section 13 was repealed by L. 1950, c. 315, sec. 3).

"As used in this section 'penal institution' means and includes the New Jersey State Prison and any other State penal or correction institution in this State to which offenders are sentenced for fixed terms or fixed minimum and maximum terms and other institutions of like character under the jurisdiction of the United States or of a State or States other than this State."

Section 35 (N.J.S.A. 30:4-123.35):

"Notwithstanding any of the provisions of this act, any prisoner in a county penitentiary serving a term having a maximum greater than a year and who has served at least one year of such term shall be permitted

to make application to the board for parole. The application shall be on forms to be prescribed and furnished by the board through the warden or chief executive officer of such county penitentiary upon certification that the prisoner desiring to make application is eligible therefor. The board upon receipt of such application may, if the circumstances of the case warrant, grant a parole to any such prisoner in the manner provided for herein, subject to such terms, conditions and limitations as the board may prescribe, and such prisoner while on parole shall be under the supervision of the probation officer of the county from which committed until the maximum term of his sentence has expired."

(4402)